NO. 90-515

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

LOCKHEED SHIPBUILDING COMPANY,
Petitioner,

vs.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS UNITED STATES DEPARTMENT OF LABOR,

and

WILBORN K. STEVENS,
Respondents.

BRIEF OF RESPONDENT WILBORN K. STEVENS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MARY ALICE THEILER
THEILER DOUGLAS DRACHLER
1613 Smith Tower
Seattle, Washington 98104
(206) 623-0900

LIST OF PARTIES

The parties in No. 89-70224 before the Court of Appeals were Wilborn Stevens, as petitioner, and the Director, Office of Workers' Compensation Programs of the United States Department of Labor and Lockheed Shipbuilding Company* as respondents.

*Lockheed Shipbuilding company is a wholly owned subsidiary of Lockheed Corporation.

TABLE OF CONTENTS

	Page
LIST OF PARTIES	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
INTRODUCTION	2
ARGUMENT	2
A. The decision of the Court of Appeals does not conflict with the decision of any other United States Court of Appeals on the same matter, nor decide a federal question in a way that is in conflict with a state court of last resort	2
B. The Court of Appeals decision is consistent with the clear language of the Lonshore and Harbor Workers Compensation Act and the intent of Congress	3
1. The Court of Appeals simply accords to Mr. Stevens those benefits and rights to which he is entitled by the clear language of the Act	3
2. The Decision Imposes no new burden on the Employer and creates no new administrative requirements	8
CONCLUSION	10

TABLE OF AUTHORITIES

A. Cases

	Page
Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984)	2
Bumble Bee Seafoods v. Director, OWCP, 629 F.2d 1327 (9th Cir. 1980)	5,10
Cordero v. Triple A Machine Shop, 580 F.2d 1331, 1334 (9th Cir. 1978), Cert. Denied 440 US 911 (1979)	5
Darden v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 224 (1986)	3
Hairston v. Todd Shipbuilding Corp., 849 F.2d 1194, 1196 (9th Cir. 1988)	5
Potomac Electric Company v. Director, OWCP, 449 U.S. 268 (1980)	8
Thompson v. McDonnell Douglas Corp., 17 BRBS 6 (1984)	3
Trask v. Lockheed Shipbuilding & Construction Company, 17 BRBS 56, 60 (1985)	4
Williams v. General Dynamics Corp., 10 BRBS 915 (1979)	3

B. Statutes

Act §8(c)(21)	5,8,9
§8(a)	6,7,8
§8(c)(1)	6,7

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I

INTRODUCTION

Respondent Wilborn K. Stevens urges that the Petition of Lockheed Shipbuilding Company for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit be denied.

II

ARGUMENT

The Petition for Writ of Certiorari should be denied for the following reasons:

A.

The decision of the Court of Appeals does not conflict with the decision of any other United States Court of Appeals on the same matter, nor decide a federal question in a way that is in conflict with a state court of last resort.

Lockheed Shipbuilding Company, Petitioner, (hereinafter "Employer") has not argued that the decision of the Court of Appeals below is conflict with either any other Court of Appeals, or a state court of last resort on a federal question. In fact, this is the first decision of any Court of Appeals to address this specific issue.

It is noteworthy that of all of the reported decisions that have addressed the issue of nature and extent of disability, there is only one Benefits Review Board Decision that can be cited as direct support for the Employer's position, Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984).

A number of other cases cited by the Court of Appeals, including Williams v. General Dynamics Corp., 10 BRBS 915 (1979) and Thompson v. McDonnell Douglas Corp., 17 BRBS 6 (1984) hold to the contrary, as does the case of Darden v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 224 (1986).

B.

The Court of Appeals decision is consistent with the clear language of the Longshore and Harbor Workers Compensation Act and the intent of Congress.

The other traditional basis for granting a Petition of Writ of Certiorari as provided by Rule 10 of the Rules of the Supreme Court of the United States is that the decision below departs from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision. While the Employer does not directly argue that such is the case, it alleges that the decision of the Court of Appeals has created a new remedy under the Longshore and Harbor Workers Compensation Act, (hereinafter "Act"), which will require extensive administration. As argued below, the decision creates no new remedy and simply reaffirms rights already extended to injured workers by the Act. No other reason exists to justify acceptance of review.

1. The Court of Appeals simply accords to Mr. Stevens those benefits and rights to which he is entitled by the clear language of the Act.

Lockheed Shipbuilding Company, the Employer herein, has asked that Certiorari be granted in order to overturn a decision of the United States Court of Appeals for the Ninth Circuit. In

that decision, the Court of Appeals overturned a decision of the Benefits Review Board, and affirmed the finding of an Administrative Law Judge of the United States Department of Labor. In its Petition for Writ of Certiorari, the Employer argues that the decision of the Court of Appeals creates a new form of recovery under the Act, and the opinion contradicts mandatory statutory language and the intent of Congress. The arguments are not well founded and the Petition should be denied.

The Act provides workers compensation benefits to certain statutorily defined employees such as Mr. Stevens. If the worker is found to be disabled by virtue of a work related injury, certain benefits are awarded, depending on the nature of the disability and its "extent" or "degree".

Disability is defined as follows:

> "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment; 33 USC 902 (10).

The nature of the worker's disability depends on whether it is temporary or permanent in nature. The nature of disability is dependent on whether or not the worker has achieved maximum medical improvement, established by medical evidence. Trask v. Lockheed Shipbuilding & Construction Company, 17 BRBS 56, 60 (1985).

The extent or degree of disability refers to whether the employee has sustained a total or partial disability. A determination of whether the worker is partially or totally disabled requires consideration of economic factors in order to

ascertain post-injury wage earning capacity. Hairston v. Todd Shipyards Corp., 849 F.2d 1194, 1196 (9th Cir. 1988).

Once an injury has occurred, the worker has the burden of showing the work-relatedness of the injury, and that the injury prevents him from performing his former job. Hairston, supra. If such a showing is made, the burden shifts to the Employer to establish residual earning capacity by showing suitable alternative employment. This burden must be met by pointing to specific jobs that the claimant can perform. Bumble Bee Seafoods v. Director, OWCP, 629 F.2d 1327 (9th Cir. 1980). A showing of general ability to perform work is not adequate. Hairston, supra, at 1196. Because of this formula for establishing extent of disability, it is a long established principal that disability is "an economic concept based on a medical foundation". Cordero v. Triple A Machine Shop, 580 F.2d 1331, 1334 (9th Cir. 1978), Cert. Denied 440 US 911 (1979).

Section 8 of the Act provides for calculating the amount of disability that shall be paid the injured worker, depending on the nature and extent of the disability. Section 8 provides that for all cases where the worker is shown to be totally disabled, compensation "shall be paid to the employee during the continuance of such total disability ... in accordance with the facts". (Emphasis added). If the disability is partial, then reference is made to §8(c) and payment is made either under the schedule set forth, or, "in all other cases", as provided in §8(c)(21). Regardless of whether the injury is considered to be

"scheduled" or "unscheduled", compensation for permanent total disability is as set forth in §8(a). As described above, permanent total disability is awarded if the Employer fails to meet the burden of showing suitable alternative employment.

In the instant case there was a dispute regarding the extent of disability of Mr. Stevens after he reached maximum medical improvement following what would be considered a "scheduled" disability[1]. While Mr. Stevens had reached maximum medical improvement on November 30, 1982, the Employer did not show suitable alternative employment until much later. At the hearing before the Administrative Law Judge, the Employer produced evidence of jobs that were shown to be available on September 30, 1985 at the earliest. Therefore, the Administrative Law Judge found that the Employer had failed to meet its burden of showing suitable alternative employment until September 30, 1985. Mr. Stevens was found to be permanently and totally disabled from November 30, 1982 until September 30, 1985, at which time he became partially disabled and was awarded compensation under §8(c)(1) for his scheduled injury.

The Employer argued that its showing of suitable alternative employment should be applied retroactively to the date of maximum medical improvement, and Mr. Stevens should be restricted to a permanent partial disability award under the "schedule", regardless of the time at which it met its burden of showing such

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[1]Mr. Stevens had sustained a 30% loss of use of his arm as a result of the work related injury.

employment. The Court of Appeals disagreed and found that the Act required an award to Mr. Stevens of permanent total disability unless and until the Employer's showing of suitable alternative employment was made. It noted that this would not preclude the Employer at a later date from coming forward with evidence of jobs that existed at an earlier time to show suitable alternate employment. The Employer would "merely need to overcome the inherent limitations of credible and trustworthy evidence".

In the instant case, Lockheed did not dispute that Mr. Stevens was temporarily totally disabled through November 30, 1982. At that time his disability changed from temporary to permanent. At the hearing below, Mr. Stevens established that he was unable to return to his previous employment. Having met his burden of showing injury, as well as his inability to perform his former job, the burden shifted to the Employer to show suitable alternative employment. Such a showing was not made until September 30, 1985, almost 3 years after maximum medical improvement. Section 8(a) provides that a totally disabled claimant is entitled to compensation "during the continuance of such total disability". At which time that he was shown to be only partially disabled by virtue of the Employer's labor market survey, Mr. Stevens was then entitled to compensation for his partial disability under §8(c)(1) of the Act.

The Decision of the Court of Appeals, affirming the Administrative Law Judge, resulted in Mr. Stevens being awarded

exactly those rights accorded to him by the Act, no more and no less. The clear language of the Act has been followed by the Court of Appeals. Therefore, the Petition should be denied.

2. The decision imposes no new burden on the employer and creates no new administrative requirements.

The Employer has argued that the Court of Appeals' decision has created a new right and remedy, and that as a result, new and expensive litigation will be required in order to administer this new remedy. The Employer's argument is incorrect on both counts.

Section 8(a) of the Act contains a clear statement that a claimant who is totally disabled, that is, who is unable to return to previous job duties and for whom no showing of suitable alternative employment has been made, is entitled to compensation "during the continuance of such total disability". This is exactly the effect of the Administrative Law Judge's ruling, reinstated by the Court of Appeals.

The Employer attempts to rely on the case of Potomac Electric Company v. Director, OWCP, 449 U.S. 268 (1980) (PEPCO) as holding that permanent total and permanent partial disability are mutually inconsistent when a scheduled injury is involved. The PEPCO decision does not support such a conclusion. Rather, this Court held that in cases involving permanent partial disability, the schedule set forth in §8(c)(21) was the exclusive remedy. PEPCO does not address the issue of whether a total disabled claimant can be retroactively deprived of total disability benefits once the Employer belatedly makes a showing

of residual earning capacity. It only holds that a partially disabled worker with a schedule injury will be limited to benefits under §8(c)(21) for those partial disability benefits.

The Employer likewise argues that administration of this alleged new remedy will be impossible, suggesting that the Court of Appeal's decision places a new burden on the Employer. To the contrary, the Court of Appeals places no more burden on the Employer than already exists, that is, to show suitable alternative employment in order to avoid a finding of total disability once a claimant has demonstrated an inability to return to his previous employment.

The Employer suggests, however, that it was the Claimant's burden of proving his permanent and total disability. ("Unless the Claimant attempted to prove he was permanent and totally disabled ...", pg. 6, Petition for Writ of Certiorari). To the contrary, the Claimant has no burden of proving permanent total disability. The Claimant only has to show a work related injury and an inability to return to his previous employment in order to enjoy the benefit of a presumption that he was permanently and totally disabled. If an Employer fails to take the necessary steps to show suitable alternative employment, whether through a labor market survey or other means, it takes the risk that the Claimant will be awarded total disability benefits. This risk is the same whether the Claimant has sustained a scheduled or unscheduled injury. The Employer has always had the burden of

proving suitable alternative employment. The only question addressed by the Court of Appeals is whether an Employer who belatedly meets that burden will be allowed to have it relieved retroactively.

Since no new remedy has been created by the Court of Appeals decision, it is obvious that there is no new burden of administration. As a matter of policy, Congress has placed certain burdens imposed in the administration of the Act on those best able to bear them. This is the reason that the burden has been put on the Employer to show suitable alternate employment. Bumble Bee Seafoods, supra, 1329.

III

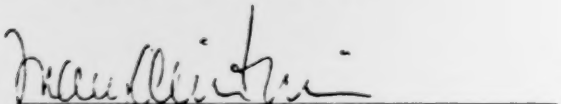
CONCLUSION

There is no conflict among the decisions of other Courts of Appeal with the instant opinion that would justify accepting certiorari in this case, nor has the Court of Appeals so far departed from the accepted and usual course of judicial proceeding so as to call for an exercise of this Court's power of supervision. A petition for a Writ of Certiorari will be granted only when there are special and important reasons therefor. Rule 10. The opinion of the Court of Appeals is consistent with the clear language of the Act. The interpretation urged by the

Employer would contradict this clear language as well as the intent of Congress. For all those reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

THEILER DOUGLAS DRACHLER
Attorneys for Respondent
Wilborn K. Stevens



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